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No. 86-341

In the Supreme Court of the United States

OCTOBER TERM, 1986

FORT HALIFAX PACKING COMPANY, INC., APPELLANT

v.

P. DANIEL COYNE, DIRECTOR, BUREAU OF LABOR STANDARDS, MAINE DEPARTMENT OF LABOR, ET AL.

ON APPEAL FROM THE MAINE SUPREME JUDICIAL COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether Section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a), preempts a Maine statute which requires major employers to provide specified severance benefits unless an employee is covered by an express contract concerning severance pay.

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INTEREST OF THE UNITED STATES

This case involves interpretation of the coverage and preemption provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. II) 1001 *et seq.* Congress enacted ERISA to promote the development of private pension and welfare plans, to assure uniform regulation of such plans, and to protect the interests of participants and beneficiaries in plan benefits. The Secretary of Labor enforces the reporting, disclosure, and fiduciary obligations that ERISA imposes on private employee benefit plans. Accordingly, he has a substantial interest in the determination of the types of plans that are covered by the federal statute

and therefore immune from state regulation under ERISA's preemption provision.

STATEMENT

A. Statutory Background

1. Congress enacted ERISA in 1974 "to promote the interests of employees and their beneficiaries in employee benefit plans" (*Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)) by requiring reporting and disclosure of information about plans, setting standards of conduct of plan fiduciaries, and providing appropriate legal remedies. 29 U.S.C. 1001(b). In addition to pension plans, the statute covers a wide range of "welfare" plans, defined as "any plan, fund or program * * * established or maintained by an employer" for the purpose of providing specified benefits, including medical, disability, death, unemployment, vacation, holiday, and severance benefits (29 U.S.C. 1002(1)). There is no question that plans providing severance benefits, the type of benefit at issue in this case, are welfare plans. *Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140, 1144-1146 (4th Cir. 1985), aff'd mem. *sub nom. Brooks* v. *Burlington Industries, Inc.*, No. 85-944 (June 23, 1986); *Gilbert* v. *Burlington Industries, Inc.*, 765 F.2d 320, 324-326 (2d Cir. 1985), aff'd mem., No. 85-441 (June 23, 1986).

ERISA imposes certain uniform standards on the design, administration, and operation of all employee benefit plans (see 29 U.S.C. (& Supp. II) 1102, 1103, 1021-1031), including standards of fiduciary conduct in the management of plans and their assets (29 U.S.C. (& Supp. II) 1104-1113. Nothing in ERISA either mandates employers to provide particular benefits or otherwise regulates the substantive content of plans.

Section 514(a) of ERISA provides that the federal statute "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. 1144(a). This broad preemption provision "was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." *Metropolitan Life Insurance Co.* v. *Massachusetts*, No. 84-325 (June 3, 1985), slip op. 13. ERISA (and thus its preemption provision) does not cover certain enumerated types of plans, including those "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." Such plans therefore remain subject to state regulation. § 4(b)(3), 29 U.S.C. 1003(b)(3).[1]

2. The state law at issue here is a Maine statute, Me. Rev. Stat. Ann. tit. 26, § 625-B (Supp. 1986), requiring employers of 100 or more employees who close or relocate their establishments to pay to employees who worked for the employer for more than three years severance benefits at the rate of one week's pay for each year of employment.[2] The state law provides that there shall be no liability for severance pay to an eligible employee in several circumstances, including where "[t]he employee is covered by an

[1] In addition, the statute explicitly exempts from preemption state laws that regulate insurance, banking, and securities (§ 514(b)(2)(A), 29 U.S.C. 1144(b)(2)(A)), and "any generally applicable criminal law of a State" (§ 514(b)(4), 29 U.S.C. 1144(b)(4)). These exemption provisions are not at issue in this case.

[2] The full text of the Maine law is set forth at J.S. App. A47-A50.

express contract providing for severance pay" (§ 625-B(3)(B)). The Director of the Maine Bureau of Labor Standards is authorized to supervise the payment of benefits due under the statute and to bring an action in state court to recover unpaid severance pay (§625-B(5)).

B. Proceedings Below

1. On May 23, 1981, appellant, Fort Halifax Packing Company, shut down its poultry processing plant at Winslow, Maine, and laid off virtually its entire work force (J.S. App. A2). Many of the laid-off employees were covered by a collective bargaining agreement between Fort Halifax and Local 385 of the Amalgamated Meat Cutters union (*id.* at A3). While the employees were eligible to participate in retirement plans,[3] at the time of the plant closing neither the collective bargaining agreement nor any other contract provided for severance pay (*ibid.*).

2. Following the plant closing, appellee, the Director of Maine's Bureau of Labor Standards, brought suit in the Superior Court for Kennebec County, Maine, seeking severance pay on behalf of all eligible Fort Halifax employees pursuant to Section 625-B (J.S. App. A30). Ruling on cross-motions for summary judgment, the trial court held Fort Halifax liable for severance pay under the state statute (*id.* at A42) and ordered payment of specified amounts to designated employees (*id.* at A21, A26-A29). The

[3] According to Fort Halifax (J.S. 3 & n.2), its employees were covered by retirement plans which entitled them to immediate vesting and distribution of plan assets upon the closing of the plant. Maine states (Mot. to Aff. 3 & n.2) that the employees were entitled to receive only their own contributions at the time the plant closed.

court rejected Fort Halifax's argument that ERISA preempts Maine's severance pay statute, concluding that "[t]he subject targeted in ERISA is the employer-employee relationship as expressed in private benefit plans, not state statutes enacted pursuant to the police power to alleviate the impact of job termination" (*id.* at A34).

The Maine Supreme Judicial Court affirmed. The court concluded that "our statute will be preempted only if it can be said to have 'a connection with or reference to' employee benefit plans that are within ERISA's coverage" (J.S. App. A7, quoting *Shaw*, 463 U.S. at 97-98). The court determined that there was no applicable employee benefit plan, reasoning that ERISA's definition and coverage provisions (29 U.S.C. 1002(1), 1003(a)), which refer to plans "established or maintained by an employer or by an employee organization, or by both," encompass only plans that are affirmatively created by the statutorily designated parties (J.S. App. A7-A8). The court instead concluded that the Maine statute merely provides a "state created fringe benefit" (*id.* at A8).[4] Moreover, the court interpreted Section 625-B's exception to liability for employees "covered by an express contract providing for severance pay" to mean that the state law applies "only when a privately created employee benefit plan covering severance pay is not in existence" (J.S. App. A8-A9). Accordingly, the court held that since the state law does not impli-

[4] The holding that the statute does not create employee benefit plans made it unnecessary for the court to reach the question whether any such plan would be exempted under Section 4(b)(3) of ERISA as a plan "maintained solely for the purpose of complying with applicable * * * unemployment compensation * * * law" (29 U.S.C. 1003(b)(3)).

cate an ERISA-covered plan, it is not preempted by ERISA (*ibid.*).[5]

SUMMARY OF ARGUMENT

ERISA's definitional and coverage provisions manifest Congress's intent to bring within the scope of exclusive federal regulation essentially all arrangements for the payment of fringe benefits except for several expressly exempted types of plans. Section 514(a), 29 U.S.C. 1144(a), provides that ERISA preempts "any and all State laws" that "relate to any employee benefit plan." This Court has held that ERISA's preemption provision "was intended to displace all state laws that fall within its sphere" (*Metropolitan Life Insurance Co.* v. *Massachusetts*, No. 84-325 (June 3, 1985), slip op. 13), rendering benefit plan regulation "exclusively a federal concern" (*Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522-523 (1981)).

The Maine severance pay statute imposes on employers a compulsory fringe benefit program of a type covered by ERISA. It requires the creation of welfare plans by mandating the payment of severance benefits under specified circumstances and providing all the terms necessary to establish severance pay plans. Because the state law mandates the creation of employee benefit plans, and does not come within

[5] The court also concluded that the Maine severance pay statute is not preempted by the National Labor Relations Act (NLRA). The court relied primarily on this Court's decision in *Metropolitan Life Insurance Co.* v. *Massachusetts*, No. 84-325 (June 3, 1985), where the Court held that there was no reason to believe that Congress, in enacting the NLRA, intended to preempt state laws "that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization" (slip op. 30).

ERISA's exceptions from preemption, it is preempted.

There is no merit to Maine's argument that the statute does not "relate to" an ERISA plan because it does not require employers to establish plans but instead merely requires employers to pay severance benefits. This Court has held that state laws which require "employers to pay employees specific benefits * * * clearly relate to benefit plans" (*Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)), and affirmed a Ninth Circuit decision holding that a Hawaii law mandating the payment of fringe benefits was preempted by ERISA (*Standard Oil Co.* v. *Agsalud*, 633 F.2d 760 (1980), aff'd mem., 454 U.S. 801 (1981)). Since the Maine statute itself sets out all the requisites of a severance pay plan and thus itself mandates the creation of such plans for covered employers, it "relates to" such plans.

The legislative history confirms that ERISA preempts state laws that mandate the payment of fringe benefits. The members of the Conference Committee that drafted ERISA's broad preemption provision understood that it broadly preempted state action in the field of private employee benefit plan regulation. Following the enactment of ERISA, Congress several times considered amendments that would have permitted the states to require that employers provide particular types of fringe benefits. The only such waiver passed by Congress, however, is limited to certain provisions of a Hawaii statute that predate ERISA. Passage of this very limited exception to ERISA preemption confirms Congress's understanding that ERISA continues to preempt all other state laws, such as the Maine severance pay statute, that create fringe-benefit payment programs of the sort covered by ERISA.

Furthermore, the decision below is inconsistent with the purposes and policies of ERISA. Congress sought in that statute to balance government regulation and voluntary employer actions in order to provide maximum feasible protection for plan participants and beneficiaries without discouraging the growth of private plans. Congress further sought to avoid duplicative regulation by providing uniform, national standards for the regulation of plans, in order to "minimize[] the need for interstate employers to administer their plans differently in each State in which they have employees" (*Shaw*, 463 U.S. at 105). The Maine severance pay statute contravenes these policies by imposing additional government regulation in an area that Congress left to the discretion of plan designers, and by opening the door to inconsistent state regulation of plans.

ARGUMENT

MAINE'S SEVERANCE PAY LAW IS PREEMPTED BECAUSE IT RELATES TO AN EMPLOYEE BENEFIT PLAN WITHIN THE MEANING OF SECTION 514(a) OF ERISA

The court below erred when it held that the Maine severance pay statute does not have any connection with or reference to an employee benefit plan covered by ERISA. Because the state law supplies all the necessary elements of a severance pay plan and is binding on employers, the Maine statute not only "relates to" but in fact both creates and wholly controls the terms of an ERISA-covered plan, and therefore is preempted by the federal statute.[6]

[6] We do not think that the Maine statute is preempted by the NLRA, however. Unlike ERISA, the NLRA contains no express preemption provision. In *Metropolitan Life Insurance Co.* v. *Massachusetts*, No. 84-325 (June 3, 1985), this Court held that the NLRA does not preempt state laws mandating inclusion of specified benefits in insurance policies purchased by employers. The Court noted that the NLRA was intended to remedy inequality in bargaining power between employees and employers, and concluded that there was no conflict between the NLRA and state minimum labor standards laws (slip op. 28-29). The National Labor Relations Board has concluded that the decision in *Metropolitan Life* controls here and mandates the conclusion that the Maine severance pay law is not preempted by the NLRA since, as this Court stated, minimum state labor standards laws like the Maine statute "affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA" (*id.* at 29).

This case is not distinguishable from *Metropolitan Life*, as Fort Halifax contends (J.S. 12), because it provides unions with a bargaining chip in that they know that employers will be required to pay severance benefits if no agreement on the subject is reached. Any minimum labor standards law grants employees rights that they do not have to bargain for, but this Court held in *Metropolitan Life* that such laws are not inconsistent with the provisions of the NLRA for that reason. There is no good reason why this case is different because the employees can agree to accept less than the mandated amount of severance pay in return for other benefits. Indeed, that factor seems to make the statute less intrusive with respect to the bargaining process rather than more intrusive.

Nor is the Maine law preempted because it prevents employers from implementing their last offer (assuming that that offer did not provide severance benefits at the rate mandated by the statute) if negotiations reach impasse, as the Chamber of Commerce contends in its brief as amicus curiae in support of the jurisdictional statement (at 13-14). There is no apparent basis for the Chamber's contention that Congress, while not intending to bar states from adopting minimum labor standards laws, nevertheless wanted employers to be able to impose offers not meeting such minimum standards if negotiations reached impasse.

Finally, there is little to commend Fort Halifax's contention (J.S. 12-13) that the Maine law is preempted because non-

A. The Language Of Section 514(a) Is Most Reasonably Construed As Preempting The Maine Severance Pay Statute

ERISA broadly defines covered "welfare plans" to include "any plan, fund, or program * * * established or maintained by an employer * * * for the purpose of providing" enumerated types of benefits "for its participants or their beneficiaries." 29 U.S.C. 1002(1). There is no question that the Maine severance pay law requires covered employers to provide severance benefits to former employees, and it is clear that severance pay is a type of benefit that is covered by ERISA. *Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140, 1144-1146 (4th Cir. 1985), aff'd mem. *sub nom. Brooks* v. *Burlington Industries, Inc.*, No. 85-944 (June 23, 1986); *Gilbert* v. *Burlington Industries, Inc.*, 765 F.2d 320, 324-326 (2d Cir. 1985), aff'd mem., No. 85-441 (June 23, 1986).

In broad language, Section 514(a) of ERISA preempts, with certain exceptions not applicable here, "any and all State laws" that relate to any employee benefit plan" as defined in the statute. 29 U.S.C. 1144(a).[7] As this Court has several times observed,

union employers may escape its terms more easily than other employers, since non-union employers can unilaterally promulgate plans providing lesser severance benefits than those mandated by the statute. That merely illustrates that non-union employers are freer to set employment terms than other employers.

[7] Governmental plans, church plans, plans maintained solely to comply with applicable workers' compensation, unemployment compensation, and disability insurance laws, plans maintained outside the United States primarily for the benefit of non-resident aliens, and excess benefit plans as defined in 29

this language shows that Congress intended ERISA to occupy the field of benefit plan regulation to the exclusion of the states in order to foster the development of employee benefit plans by relieving employers of potentially conflicting state requirements. *Metropolitan Life Insurance Co.* v. *Massachusetts*, No. 84-325 (June 3, 1985), slip op. 13 ("[t]he preemption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements"); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 105 & n.25 (1983) ("Congress minimized the need for interstate employers to administer their plans differently in each State in which they have employees"); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522-523 (1981) (Congress made pension plan regulation "exclusively a federal concern").[8] As the Court made clear in *Metropolitan Life* (slip op. 13), ERISA's preemption provision extends to state laws that regulate plan contents even though this is an area left unregulated by ERISA.

This Court has concluded that "relates to" in Section 514(a) must be read broadly, as the normal meaning of the phrase suggests (*Shaw*, 463 U.S. at 96-97), and the decisions of this Court establish that state laws "relate to" ERISA plans insofar as they

U.S.C. 1002(36) are not covered by ERISA. § 4(b), 29 U.S.C. 1003(b). Therefore, state laws relating to such plans are not preempted.

[8] The lower federal courts have also noted the broad sweep of ERISA's preemption provision. See, *e.g.*, *Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140, 1147 (4th Cir. 1985), aff'd mem. *sub nom. Brooks* v. *Burlington Industries, Inc.*, No. 85-944 (June 23, 1986) (noting "the unparalleled breadth of ERISA's preemption provision").

compel the creation of plans, require employers to provide particular plan benefits, or otherwise regulate the content of plans. Thus, for example, in *Shaw* the Court concluded that "the [New York] Disability Benefits Law, which requires employers to pay employees specific benefits, clearly 'relate[s] to' benefit plans" (463 U.S. at 97). And in *Standard Oil Co.* v. *Agsalud,* 633 F.2d 760, 766 (9th Cir. 1980), aff'd mem., 454 U.S. 801 (1981), this Court affirmed a Ninth Circuit decision invalidating Hawaii's prepaid health care law, which establishes minimum health insurance benefits that employers must provide their employees, on the ground that it "directly and expressly regulates employers and the type of benefits they provide employees" and therefore "must 'relate to' employee benefit plans within the meaning of [ERISA]." Cf. *Metropolitan Life,* slip op. 13 (a Massachusetts law that indirectly regulates plans by requiring the inclusion of mental health benefits in particular kinds of common insurance policies "relates to" employee benefit plans because it effectively requires plans that fund benefits through the purchase of insurance to provide the mandated benefits when they purchase a state-regulated insurance policy).

Maine argues, and the court below held, that Maine's statutorily mandated severance pay program is not preempted because it "does not implicate a plan created by an employer or employee organization" (J.S. App. A8). However, by directing employers to provide fringe benefits of a kind that Congress intended ERISA to cover, the Maine statute requires employers to establish plans covered by ERISA. Although ERISA does not define the various terms used in the definition of "plan," in *Donovan* v. *Dillingham,*

688 F.2d 1367 (1982) (en banc), the leading case construing these provisions, the Eleventh Circuit squarely addressed what constitutes the establishment of a plan under ERISA. The court concluded that "a 'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits" (688 F.2d at 1373). The Maine severance pay statute satisfies all of the *Dillingham* criteria by requiring employers to pay certain severance benefits to qualified employees, from general assets, pursuant to specified procedures. It is clear that if an employer stated in a handbook distributed to employees that it would pay severance benefits to employees who had worked for the employer for three years at the rate of one week's pay for each year of employment (the terms of the Maine statute), it would have created an employee benefit plan subject to ERISA under the *Dillingham* criteria.[9] Because the state law contains all the elements of a plan and is binding on employers, and since it must be presumed that an employer intends to comply with applicable state law, there is no need for any further action by the employer independently to manifest the establishment or maintenance of a plan. It follows that since Maine's severance pay

[9] This Court has recognized that informal and unfunded severance pay plans are covered by ERISA and immune from state regulation. *Gilbert* v. *Burlington Industries, Inc.*, 765 F.2d 320, 325-326 (2d Cir. 1985), aff'd mem., No. 85-441 (June 23, 1986); *Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140, 1145-1146 (4th Cir. 1985), aff'd mem. *sub nom. Brooks* v. *Burlington Industries, Inc.*, No. 85-944 (June 23, 1986).

statute mandates creation of ERISA plans of a type not expressly excluded from coverage under the federal statute, the state law relates to employee benefit plans and is preempted.[10]

Moreover, there is nothing in the statute or its underlying policy to support a distinction between plans voluntarily established by employers and plans established as a result of compulsory state laws. To the contrary, as the Ninth Circuit explained in *Agsalud*, "[t]here is no express exemption from ERISA coverage for plans which state law requires private employers to provide their employees" (633 F.2d at 764). *Agsalud* involved a challenge to Hawaii's mandatory employee health insurance law. The employer

[10] It appears that the decision below embraces a false dichotomy between state action mandating the payment of benefits and state action mandating the establishment of a plan to provide benefits. Since the state law at issue supplies all the elements of a plan, the only possible distinction between mandating the payment of benefits and mandating the establishment of a plan arises from the absence of certain formalities attendant to the administration of a plan. Plans covered by ERISA, for example, must be established pursuant to a written instrument (29 U.S.C. 1022, 1102) and are subject to ERISA's reporting, disclosure, and fiduciary requirements (see 29 U.S.C. (& Supp. II) 1021-1031, 1101-1114). But, as the court explained in *Dillingham*, the provisions imposing responsibilities on plan administrators and fiduciaries are consequences of, and not prerequisites to, coverage under ERISA (688 F.2d at 1372). Because it is clear that, under Section 514(a), a state cannot mandate the establishment of an ERISA plan, and because there is no legally significant distinction between mandating the establishment of a plan and mandating the payment of a benefit, it follows that a state cannot mandate the payment of a fringe benefit of a type covered by ERISA without running afoul of ERISA's preemption provision.

sought to prevent the state from enforcing recent amendments to the state law requiring plans to cover, in addition to other specified minimum benefits, the diagnosis and treatment of alcohol and drug abuse. The Ninth Circuit rejected the state's argument that its statute was not preempted because it required employers to provide benefits, concluding that "[t]he plans envisioned under the Hawaii statute are * * * not rendered outside the definition of employee welfare benefit plans simply because Hawaii has attempted to make them mandatory" (633 F.2d at 764). This Court's affirmance in *Agsalud* confirms that ERISA does not distinguish between plans that are voluntarily established by an employer and those that are required by state law.[11] As did the state prepaid health care law in *Agsalud*, the Maine severance pay law "relates to" covered plans because it "directly and expressly regulates employers and the type of benefits they provide employees" (*id.* at 766).

The conclusion that ERISA precludes states from mandating the payment of ERISA-covered fringe benefits also follows from the structure of the statute. Section 4(b)(3), 29 U.S.C. 1003(b)(3), expressly exempts from ERISA coverage several types of plans, including those "maintained solely for the purpose of complying with applicable workmen's

[11] Maine mistakenly argues (Mot. to Aff. 11) that the holding of *Agsalud* is limited to circumstances involving the imposition of additional requirements on a pre-existing plan. While it is true that the employer in *Agsalud* had voluntarily provided its employees with a self-funded health care plan that failed fully to comply with the Hawaii law, the decision in that case turned not on the pre-existence of a private plan, but on the broader reasoning that there is no ERISA exemption "for plans which state law requires private employers to provide for their employees" (633 F.2d at 764).

compensation laws or unemployment compensation or disability insurance laws." Section 4(b)(3) thus permits states to require employers to provide certain state-mandated benefits. See *Shaw*, 463 U.S. at 108. But, as the Ninth Circuit, affirmed by this Court, concluded in *Agsalud*, only those types of compulsory plans specifically identified in Section 4(b)(3) are exempted from ERISA's preemptive scope; "the broad preemption of all other compulsory plans prevents state experimentation with other types of programs" (633 F.2d at 765). Because severance pay is not a type of benefit that is exempted from ERISA's coverage by Section 4(b)(3), Maine's compulsory severance pay program is preempted by ERISA.[12]

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[12] Maine argues (Mot. to Aff. 12 n.8) that because one purpose of its law is to ease the burdens of unemployment resulting from plant closings, it comes within the statutory exemption for "unemployment compensation laws." But the exemption in Section 4(b)(3) pertains only to plans maintained "*solely*" to provide the specified benefits, and unemployment is not a necessary condition to the receipt of benefits under the Maine statute. Me. Rev. Stat. Ann. tit. 26, § 625-B(3) (Supp. 1986). Cf. *Alessi*, 451 U.S. at 523 n.20 (narrowly construing the exemption for plans maintained solely to comply with state workers' compensation laws as having "no bearing" on plans "which more broadly serve employee needs as a result of collective bargaining").

Moreover, it is clear from Maine law that severance pay and unemployment compensation are different. Maine's unemployment compensation law bases the amount of compensation due on the amount of wages a claimant has earned (Me. Rev. Stat. Ann. tit. 26, § 1191 (Supp. 1986)), and the term "wages" is defined to include severance pay (§ 1043(19)). Thus, receipt of severance pay *increases* the amount of unemployment compensation due; if severance pay was a substitute for unemployment compensation, it would *decrease* the amount owed.

Maine also argues (Mot. to Aff. 8-9) that an "essential element of an ERISA plan," implicit in the overall structure of ERISA, "is that there be an ongoing program of benefits," and that "a one-time payment of benefits is not sufficient to constitute an ERISA plan." There is nothing in the statute that commands this result. To the contrary, ERISA expressly defines the term "welfare plan" to include one type of program, death benefits, that generally involve a one-time payment to beneficiaries. § 3(1), 29 U.S.C. 1002(1).[13] Moreover, ERISA's reporting,

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[13] The cases cited by Maine (Mot. to Aff. 9) are not to the contrary. *Martori Bros. Distributors* v. *James-Massengale*, 781 F.2d 1349, amended on other grounds, 791 F.2d 799 (9th Cir. 1986), cert. denied, No. 86-464 (Nov. 10, 1986), involved an order of the California Agricultural Labor Relations Board (ALRB) requiring employers who had failed to bargain in good faith to make whole their employees by paying them a lump sum representing the total value of the compensation package the employees would have received had the employers bargained in good faith, less what they actually received. The Ninth Circuit rejected the argument that, because the make-whole award included a component representing the fringe benefits that would have resulted from good-faith bargaining, it amounted to the creation of a new ERISA plan preempted under Section 514(a). The court emphasized that the award was a payment of damages, and concluded that "[b]ecause the ALRB is not ordering the payment of fringe benefits, there is not even a colorable argument that it has created new ERISA plans" (781 F.2d at 1358). Inasmuch as the court's holding turned on the nature of the award, rather than the frequency of the payment, the court's statement that it is "difficult to see how the making of one-time lump sum payments could constitute the establishment of a plan" (*ibid.*) cannot be read, as Maine contends, to support the proposition that a one-time payment of a fringe benefit can never constitute an ERISA plan.

In *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1504 (1985), the Ninth Circuit applied the *Dillingham* test (see pages 12-13,

disclosure, and fiduciary requirements are relevant to plans that anticipate only a one-time payment of benefits. Information regarding the nature and amount of benefits and the procedures for their payment are of no less importance to participants and beneficiaries who are entitled to receive their benefits in a lump sum than they are to individuals whose benefit payments may continue over a period of time.

B. The Legislative History Of Section 514 Reflects Congressional Intent To Preempt State-Mandated Fringe Benefit Laws

The legislative history of Section 514 confirms Congress's intent to occupy the field of fringe benefit regulation to the exclusion of the states. Sensitive to the fact that the private benefit system is voluntary on the part of employers, Congress determined to minimize the disruptive effect of the new federal law by protecting benefit plans from regulation under inconsistent state laws. Earlier Senate and House versions of the legislation each contained language which appeared to limit ERISA's preemption to contrary or inconsistent state law, leaving the states to regulate where ERISA did not. See *Shaw*, 463 U.S. at 98 & n.18; 120 Cong. Rec. 5002 (Senate version), 4742

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supra) to determine that the employer's agreement to pay severance benefits amounted to the establishment of an ERISA plan. The court agreed with *Dillingham* that "a mere allegation that an employer * * * ultimately decided to provide an employee welfare benefit is not enough to invoke ERISA's coverage" (*ibid.*). However, the Ninth Circuit held that the complaint before it clearly contained sufficient allegations showing the existence of a plan to invoke ERISA coverage, and found it unnecessary to determine "the minimum that must be alleged to justify preemption by ERISA" (*ibid.*). As we have shown, in this case the Maine severance pay law supplies all the necessary elements for the establishment of a plan.

(House version) (1974). Both versions were rejected in conference and the present broad language of Section 514(a) was substituted. H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 383 (1974), *reprinted in* 3 Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 4277, 4650 (Comm. Print 1976) [hereinafter cited as *Leg. Hist.*].

The House and Senate conferees all stated that the purpose of the broad preemption provision they drafted was to reserve sole authority in the federal government to regulate benefit plans covered by the statute. Senator Javits, one of the principal sponsors of the legislation, explicitly affirmed Congress's intent to occupy the employee benefit plan field completely, while acknowledging that the consequences might often mean no substantive regulation at all. He stated (120 Cong. Rec. 29942 (1974) (quoted 463 U.S. at 100 n.20)): "Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs." See also *Shaw*, 463 U.S. at 99; 120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent) (describing "the reservation to Federal authority the sole power to regulate the field of employee benefit plans" as "the crowning achievement of this legislation"); *id.* at 29933 (remarks of Sen. Williams) (ERISA "preempt[s] the field for federal regulation[], thus eliminating the threat of conflicting or inconsistent State and local regulation"). Thus, as this Court noted, the Conference

Committee "indicated that the section's pre-emptive scope was as broad as its language" (*Shaw*, 463 U.S. at 98).

The conferees agreed to assign a Congressional Pension Task Force the responsibility of studying and evaluating the effects of the broad preemption provision, and, with only one relevant exception, Congress thus far has rejected proposals to cut back on the scope of federal preemption. See *Oversight on ERISA, 1978: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 95th Cong., 2d Sess. 521-686 (1978). That exception involved the Hawaii prepaid health care law at issue in *Agsalud*. In 1983 Congress amended ERISA to create a very limited exemption providing that parts of the Hawaii Prepaid Health Care Act, Haw. Rev. Stat. §§ 393-1 to 393-51 (1976 & Supp. 1984) enacted before ERISA took effect are not preempted. 29 U.S.C. 1144(b)(5), as added by Pub. L. No. 97-473, § 301(a), 96 Stat. 2611.[14] Congress considered that "[t]o exempt from ERISA's preemption the Hawaii Prepaid Health Care Act as it existed on the date ERISA was enacted is purely a matter of equity." 128 Cong. Rec. H9607 (daily ed. Dec. 13, 1982) (remarks of Rep. Burton). Representative Erlenborn, the ranking minority member of the House Committee on Education and Labor, explained that Congress viewed the Hawaii law as "an unusual special case," and considered that "[i]n

[14] The amendment did not save the requirements for compulsory benefits that were added after the enactment of ERISA and had spurred the suit in *Agsalud*. Nor did it exempt from preemption those portions of the Hawaii law that pertained to reporting, disclosure, and fiduciary responsibilities, or rules for plan administration and enforcement, subjects which are regulated by ERISA. 29 U.S.C. 1144(b)(5).

agreeing to the Hawaii exception this body will be reaffirming the broad scope of ERISA preemption and the validity of the interpretation of the Federal courts in connection with the Hawaii statute." 128 Cong. Rec. H9610 (daily ed. Dec. 13, 1982). Accordingly, Congress expressly declined to save any other similar state laws, providing instead that the amendment "shall not be considered a precedent with respect to extending such amendment to any other state law." Pub. L. No. 97-473, § 301(b), 96 Stat. 2612.[15]

Congress's action in 1983 was consistent with its earlier refusals to expand the scope of the Section 4(b)(3) exclusions to ERISA. In 1977 legislation was introduced (S. 1383, 95th Cong., 1st Sess. (1977)) that would have made ERISA inapplicable to employee benefit plans maintained solely for the purpose of complying with state "health insurance laws." See 123 Cong. Rec. 12170 (1977). And in 1979 a bill was introduced (S. 209, 96th Cong., 1st Sess. (1979)) that would have saved the Hawaii health care law as well as any other state law determined by the Secretary of Labor to be "substantially identical" to the Hawaii law. See 125 Cong. Rec. 930, 937 (1979). Neither bill was enacted. The creation of a limited exemption for the Hawaii law, coupled with congressional refusals to further limit the scope of ERISA's preemption provision, shows

[15] The Senate Report stated that "[t]he committee believes that the preemption of the Hawaii Prepaid Health Care Act by ERISA was inadvertent." S. Rep. 97-646, 97th Cong., 2d Sess. 18 (1982). While that statement suggests that the Committee disapproved of the result in *Agsalud*, Congress clearly did not change the general effect of Section 514(a) (since it did not amend that provision), but instead made a limited exception applicable to Hawaii only.

that Congress is aware that ERISA preempts state laws mandating the payment of fringe benefits covered by ERISA, yet has chosen not to alter the pattern of exclusive federal regulation. This congressional understanding that the states are barred from mandating the payment of fringe benefits covered by ERISA in the absence of any exclusion in Section 4(b)(3) is entitled to great weight. See, *e.g.*, *Bell* v. *New Jersey*, 461 U.S. 773, 784-785 & n.12 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378 & n.61 (1982).

C. The Purposes And Policies Of The Statute Support The Conclusion That ERISA Preempts State-Mandated Fringe Benefit Laws

Preemption of state fringe benefit laws is also consistent with Congress's intent in ERISA to leave decisions concerning the content of plans "subject to the discretion of * * * plan designers." *Alessi*, 451 U.S. at 525.[16] In ERISA Congress neither required nor forbade employers to provide any particular type of benefit. See *Shaw*, 463 U.S. at 91. Instead, Congress considered a "fundamental aspect" of the law to be "reliance on voluntary action by employers * * * for the establishment of * * * plans." H.R. Rep. 93-807, 93d Cong., 2d Sess. 8 (1974), *reprinted in* 2 *Leg. Hist.* 3115, 3128.[17] Accordingly, a major concern

[16] Because Section 514(a) draws no distinction between pension plans and welfare plans, the preemption principles of Section 514(a), as construed by the Court in *Alessi* and as discussed in the legislative history, apply to cases involving welfare plans, as this Court has recognized (see *Shaw*, 463 U.S. at 105).

[17] See also S. Rep. 93-383, 93d Cong., 1st Sess. 1 (1973), reprinted in 1 *Leg. Hist.* 1069 ("the Committee recognized that private retirement plans are voluntary on the part of the

in the enactment of ERISA was that "governmental supervision of mandated and essential improvements * * * might impede plan growth." S. Rep. 93-127, 93d Cong., 1st Sess. 8 (1973), *reprinted in* 1 *Leg. Hist.* 587, 594. Congress therefore sought "to strike an appropriate balance between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs, and the need of the workers for a level of protection which will adequately protect their rights and just expectations" (S. Rep. 93-127, *supra*, at 13; 1 *Leg. Hist.* 599). To permit states to assert additional governmental control by mandating payment of specified employee benefits would upset this careful balance between private and governmental control over ERISA plans.

Varied state regulation of ERISA-covered fringe benefits also raises another central concern of ERISA's preemption clause. As this Court explained in *Shaw*, even where state laws are not in conflict, compliance with multiple state laws could cause an employer to "reduce wages or eliminate those benefits not required by any State" (463 U.S. at 105 n.25). As this observation reflects, a state requirement that employers increase the amount of a particular fringe benefit will usually result in the lowering of wages or the adjustment of other fringe benefits. Employers subject to the Maine severance pay statute might, for example, revise their retirement plans to provide for lesser benefits. This Court concluded in *Shaw* that "ERISA's comprehensive pre-emption of state law was meant to minimize this sort of interference with

employer, and, therefore, it has carefully weighed the additional costs to the employer and minimized them to the extent consistent with minimum standards for retirement benefits").

the administration of employee benefit plans" (*ibid.*). Thus, the Maine statute at issue in this case involves just the sort of state interference with plans that Congress sought to avoid.

Further, laws like the Maine statute involved here could significantly affect the efficiency of plan administration by leading multistate employers to establish a number of separate state plans or to adjust benefit levels under their plan in different states. As this Court noted in *Shaw*, "the inefficiency of such a system presumably would be paid for by lowering benefit levels" (463 U.S. at 105 n.25).

By narrowly interpreting the term "plan" to exclude state-mandated benefits, the decision below permits a state to do in whole—mandate the payment of severance benefits—what it cannot do in part—regulate the payment of severance benefits payable under a plan. Since under this approach a state could require employers to pay directly from general assets any or all of the fringe benefits enumerated in ERISA that are not covered by an existing plan, the lower court's decision stands as an invitation to other states to mandate the payment of fringe benefits in an attempt to reduce governmental costs associated with public benefit programs. Such laws would be the type of "multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme" that Congress sought to foreclose by enacting Section 514(a). 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits). If permitted to stand, the lower court's narrow reading of the term "plan" would undermine Congress's purposes in ERISA of preserving the autonomy of plan sponsors to determine the contents of

their employee benefit plans and providing for the uniform federal regulation of those plans.

CONCLUSION

The judgment of the Maine Supreme Judicial Court should be reversed.

Respectfully submitted.

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